U.S. DISTRICT COURT
DISTRICT OF VERMONT
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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

KELLEY MERCURE,)
)
Plaintiff,)
)
v.) Case No. 5:15-cv-168
)
BURLINGTON HOUSING AUTHORITY,)
)
Defendant.)

OPINION AND ORDER REGARDING MOTION FOR SUMMARY JUDGMENT (Doc. 24)

Kelley Mercure has sued the Burlington Housing Authority ("BHA"), alleging that BHA discriminated against her on account of her disability when it denied her a fifth extension of time to use her housing voucher for subsidized housing, in violation of the Fair Housing Act and the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601–3631. BHA has moved for summary judgment, arguing that Mercure's complaint is untimely because it was filed outside the applicable two-year statute of limitations and that she lacks any basis for tolling the application of the statute. The court has subject matter jurisdiction under 28 U.S.C. § 1331. The court held a hearing on the motion on September 1, 2016, at which time the motion was taken under advisement.

I. Facts

The material facts of this case are not in dispute. They are drawn from the parties' summary judgment filings, including their statements of undisputed facts and supporting exhibits.

a. Application for voucher and extensions of voucher deadline

In January 2012, Kelley Mercure completed the application process for a Housing Choice Voucher under BHA's Family Unification Program. (Doc. 24-1 ¶ 34.) The program provides rental subsidies to families with limited financial resources that, because of inadequate housing, are either at risk of having a child placed in out-of-home care or cannot have a child returned to the family from out-of-home care. (*Id.* ¶¶ 4, 7–8, 11.) On March 7, 2012, BHA issued a voucher to Mercure. (*Id.* ¶ 42.) The voucher serves as a statement of a participant's eligibility for subsidies under the program, but it does not guarantee that a participant will receive such subsidies. (*Id.* ¶ 19.) Instead, upon receiving a voucher, a participant must find a rental unit that meets the program's standards. (*Id.* ¶¶ 22–25.) Once a participant has located a unit and BHA has approved it, the participant leases the unit and BHA executes a contract with the property owner and pays the determined rental subsidies directly to the property owner. (*Id.* ¶¶ 26–30.)

The voucher gave Mercure 60 days (until May 6, 2012) to find appropriate housing. (Doc. 24-1 ¶ 43.) At a briefing session on March 7, 2012, BHA provided Mercure with a booklet from the Department of Housing and Urban Development ("HUD") entitled, "Fair Housing: Equal Opportunity for All." (*Id.* ¶ 86.) The booklet referenced both a one-year statute of limitations for filing administrative complaints with HUD regarding housing discrimination and a two-year statute of limitations for filing civil actions. (*Id.* ¶¶ 87–88.)

BHA granted four requests by Mercure for an extension of the voucher's deadline: a 60-day extension (to July 4), and then three 30-day extensions (to August 2, September 2, and October 2). (Doc. 24-1 ¶¶ 45–52.) The third and fourth extensions were expressly granted as reasonable accommodations for Mercure's disability. (*Id.* ¶¶ 47–52; Doc. 24-12; Doc. 24-13.)

On September 24, Mercure requested a fifth extension, but BHA denied this request on October 4. (Doc. 24-1 ¶¶ 68–71.)

b. Requests for reconsideration and complaints filed with BHA

After the denial of the request for a fifth extension, Mercure spent the next year attempting to convince BHA to reconsider its decision. On October 20, 2012 Mercure wrote a letter to Claudia Donovan, the Director of Rental Assistance Programs at BHA, asking BHA to reconsider and providing documentary evidence of her disability. (Doc. 31-2 ¶¶ 8–9.) Donovan responded on November 14, denying Mercure's request. (*Id.* ¶ 11.)

On December 3, Mercure wrote to Paul Dettman, BHA's Executive Director, complaining that the denial of another extension had hampered her ability to find appropriate housing and stating that she felt discriminated against on account of her disability. (Doc. 31-2 ¶ 13.) Ten days later Dettman denied Mercure's request for an extension of the voucher. (*Id.* ¶ 14.)

On January 11, 2013, Mercure wrote to Michael Knauer, the Chair of the Board of Commissioners for BHA, complaining of unprofessional conduct by Donovan and Dettman and stating that the denial of her request for an accommodation had been discriminatory. (Doc. 31-2 ¶ 17.) Knauer responded on February 20, stating that the Board of Commissioners was not responsible for the voucher program, nor were decisions regarding vouchers subject to an informal hearing process. (*Id.* ¶ 18.) Three days later, Mercure again wrote Knauer, complaining that Dettman had denied her an in-person meeting and that BHA had discriminated against her on account of her disability. (*Id.* ¶ 20.)

In February and March 2013, Mercure sought assistance from the Vermont Human Rights Commission and the Vermont Attorney General's Office, but neither offered any help. (Doc. 31-2 ¶¶ 21–23.)

In August 2013, Mercure again wrote to Knauer, detailing BHA's alleged violations of federal housing regulations and its failure to provide her with HUD Form 903 (a form that can be used to file an administrative grievance with HUD) during any of their previous communications. (Doc. 31-2 ¶¶ 24–25.) She requested a meeting with BHA to resolve her claim of discrimination. (*Id.* ¶ 24.) On September 13, Dettman informed Mercure that a response would be forthcoming. (*Id.* ¶ 26.) Knauer responded on November 21, stating that he believed BHA staff had acted appropriately in denying her request for a fifth extension. (Doc. 31-2 ¶ 28; Doc. 31-30.)

c. Administrative grievance and civil case

After failing to obtain any relief from BHA, Mercure wrote on December 5, 2013 to the district director of HUD, alleging numerous violations of federal housing regulations by BHA. (Doc. 24-1 ¶¶ 72–73.) HUD acknowledged receiving the grievance on January 9, 2014. (Doc. 31-20.) On February 25, 2014, Talitha Pope, an employee of HUD, informed Mercure that she was building a timeline of the events surrounding the denial of Mercure's request for an extension. (Doc. 31-2 ¶ 30.) In March, Pope told Mercure that her complaint had been referred to HUD's Office of Fair Housing and Equal Opportunity. (*Id.* ¶ 31.) In May, Mercure provided a HUD investigator with medical records and a narrative of her experience with BHA. (*Id.* ¶ 33.)

On June 17, Pope informed Mercure that HUD could not investigate her discrimination claim because her December 2013 complaint was untimely under the one-year deadline for administrative complaints regarding housing discrimination. (Doc. 24-1 ¶¶ 77–79; Doc. 31-2

¶ 35; Doc. 24-17 at 1.) The email also referred to the two-year statute of limitations for civil actions under the Fair Housing Act and stated that "there still may be some time for Ms. Mercure to take this action if she chooses." (Doc. 24-17 at 1.) Mercure responded on July 1, complaining that BHA had never provided her with HUD Form 903. In another email on August 21, Pope again informed Mercure that her administrative complaint was untimely and again recommended that she file a civil action, noting that it had to be filed within two years. (Doc. 24-21.) Mercure wrote again to Pope on September 3. (Doc. 31-2 ¶¶ 37–38; Doc. 31-28.) On September 25, Pope again advised Mercure that she should "contact legal representation . . . to see what your civil options are" and informed her that a "final response letter" regarding Mercure's complaint had been drafted. (Doc. 24-22.) On October 23, 2014, Mercure received a formal letter from HUD denying her administrative complaint as untimely. (Doc. 31-2 ¶ 39; Doc. 24-18.)

On July 17, 2015, Mercure filed the complaint in this case. (Doc. 1.) The complaint alleges that BHA failed to grant her a reasonable accommodation in light of her disability by providing her with a further extension of her voucher to find suitable housing. BHA has moved for summary judgment on the ground that Mercure's complaint is untimely. (Doc. 24.)

II. Analysis

In deciding a motion for summary judgment, the court considers all evidence in the light most favorable to the non-moving party. *Kazolias v. IBEW LU 363*, 806 F.3d 45, 49 (2d Cir. 2015). This standard requires the court to accept as true the affidavits and other evidence submitted by the non-moving party. *Saks v. Franklin Covey Co.*, 316 F.3d 337, 348 (2d Cir. 2003) (quoting *Kulak v. City of N.Y.*, 88 F.3d 63, 71 (2d Cir. 1996)).

a. Statutory tolling

BHA argues that Mercure cannot proceed with her claim against it under the Fair Housing Act because it is untimely. It points out that Mercure's civil action, filed on July 17, 2015, was filed 33 months after her claim accrued on October 4, 2012, when BHA denied Mercure's request for a fifth extension. (Doc. 24-2 at 3–4.) It argues that the two-year statute of limitations was not tolled for the 10 ½ months between December 5, 2013 and October 23, 2014, during which HUD was considering Mercure's administrative complaint because that complaint, filed 14 months after the alleged discriminatory practice, was also untimely. (Doc. 24-2 at 4–5.)

Mercure responds that she should be entitled to rely on the statutory tolling provision for the nine months between HUD's acknowledgment of her complaint (January 9, 2014) and its final decision to decline to investigate because her complaint was untimely (October 23, 2014) because, even though HUD ultimately concluded that her complaint was untimely, they were "processing" it during those months. (Doc. 31 at 2 & n.1.)

Under the Fair Housing Act, a person who believes that she has been subject to a discriminatory housing practice may file an administrative complaint with HUD, 42 U.S.C. § 3610, or bring a civil action in federal or state court, *id.* § 3613. One need not exhaust her administrative remedies under § 3610 before bringing a civil action. *Id.* § 3613(a)(2). Administrative complaints must be filed "not later than one year after an alleged discriminatory housing practice has occurred or terminated," *id.* § 3610(a)(1)(A)(i), while civil actions must be filed within two years of the alleged discriminatory conduct, *id.* § 3613(a)(1)(A). This two-year statute of limitations is tolled during the pendency of administrative proceedings. *Id.* § 3613(a)(1)(B).

The court concludes that an untimely filed administrative complaint does not toll the running of the two-year statute of limitations for civil actions alleging housing discrimination. The tolling provision specifies that computation of the two-year statute-of-limitations period excludes "any time during which an administrative proceeding under this subchapter was pending with respect to a *complaint or charge under this subchapter* based upon such discriminatory housing practice." 42 U.S.C. § 3613(a)(1)(B) (emphasis added). In turn, § 3610(a)(1)(A)(i) provides that an administrative proceeding is initiated by an administrative complaint filed "*not later than one year after* an alleged discriminatory housing practice." (emphasis added.) Thus, it is administrative proceedings with respect to complaints filed not later than one year after the alleged discriminatory conduct that toll the statute of limitations. One district court has concluded as much. *Fair Hous. Council of Or. v. Cross Water Dev., LLC*, No. C08-5755, 2009 WL 799685, at *2 (W.D. Wash. Mar. 24, 2009). Another court has found that an improperly filed administrative complaint—it failed to name one of the defendants as a respondent—did not toll the statute of limitations as to the plaintiff's claims against that defendant. *Sentell v. RPM Mgmt. Co.*, 653 F. Supp. 2d 917, 921–22 (E.D. Ark. 2009).

Nor do other remedial schemes that include both administrative and civil remedies support Mercure's contention that an untimely administrative complaint should toll the statute of limitations for her civil action. For instance, in remedial schemes where a plaintiff must first exhaust administrative remedies before filing a civil action, pendency of administrative proceedings either tolls the applicable statute of limitations, *see Gonzalez v. Hasty*, 651 F.3d 318, 323–24 (2d Cir. 2011) (holding that exhausting administrative remedies under the Prisoner Litigation Reform Act tolls applicable statutes of limitations for subsequent civil actions), or simply acts as a necessary prerequisite to suit, *see McPherson v. N.Y.C. Dep't of Educ.*, 457 F.3d

211, 213–14 (2d Cir. 2006) (explaining that plaintiff cannot bring employment discrimination claim under Title VII of the Civil Rights Act of 1964 without first receiving a "'right-to-sue' letter [from the EEOC] because the notification is a prerequisite to suit"). In these circumstances, an untimely administrative grievance is a bar to suit. *See Woodford v. Ngo*, 548 U.S. 81, 83–84 (2006) (holding that an "untimely or procedurally defective" administrative grievance does not exhaust administrative remedies for prisoner claim under PLRA); *McPherson*, 457 F.3d at 214 (holding that plaintiff can only bring Title VII claim if the administrative charge was timely filed); *see also Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005) (holding that a state prisoner's failure to timely file a state postconviction petition means that he has not exhausted his state remedies and therefore cannot proceed with his federal habeas corpus petition).

On the other hand, where an aggrieved party need not exhaust administrative (or state judicial remedies) before pursuing federal civil remedies, then the pendency of administrative proceedings has no effect on the running of the statute of limitations for the civil remedy. *See, e.g., Bd. of Regents v. Tomanio*, 446 U.S. 478, 489–92 (1980) (holding that 42 U.S.C. § 1983 does not require plaintiff to pursue state judicial remedy first, so pendency of state judicial proceeding does not toll statute of limitations for § 1983 action); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 460–66 (1975) (holding that pendency of Title VII administrative proceeding does not toll statute of limitations for action under 42 U.S.C. § 1981 because "Title VII's administrative machinery" is not a "prerequisite[] for the institution of a § 1981 action"). In these cases, the timeliness or untimeliness of administrative grievances is irrelevant, since even a timely-filed administrative grievance does not toll the statute of limitations.

In none of these administrative schemes does an untimely filed administrative grievance toll the statute of limitations for a related civil action, nor has Mercure identified any statutory scheme where this is so. Moreover, the FHA remedial scheme is already more lenient than both kinds of administrative remedies described above—FHA administrative proceedings both toll the statute of limitations *and* need not be exhausted before filing suit. The court cannot see any reason to extend this leniency even further and hold that an untimely administrative complaint is sufficient to toll the statute of limitations for civil actions under the FHA.

b. Equitable tolling

Equitable tolling is appropriate where "the person seeking application of the equitable tolling doctrine (1) has acted with reasonable diligence during the time period she seeks to have tolled, and (2) has proved that the circumstances as so extraordinary that the doctrine should apply." *Zerilli-Edelglass v. N.Y.C. Transit Auth.*, 333 F.3d 74, 80–81 (2d Cir. 2003) (internal quotation marks omitted). The burden of proving that equitable tolling is appropriate is on the plaintiff. *Chapman v. ChoiceCare Long Island Term Disability Plan*, 288 F.3d 506, 512 (2d Cir. 2002).

Equitable tolling is inappropriate here. Mercure was not diligent in pursuing her rights, especially when she had notice of her right to file a civil action and the applicable statute of limitations before it expired. First, Mercure does not contest that, when she received her voucher in March 2012, she also received a copy of the fair housing booklet produced by HUD. (Doc. 24-1 ¶¶ 86–87; Doc. 31-1 at 7.) That booklet specifies that administrative complaints must be filed within one year and civil actions within two years of the alleged discriminatory practice. (Doc. 24-19 at 6, 10.) Second, a HUD employee, in two emails sent in June and August 2014, suggested to Mercure that she file her civil action before her time to do so ran out. (Doc. 24-17 at 1; Doc. 24-21.) Despite this notice, Mercure opted to pursue relief through informal requests to BHA and an administrative complaint to HUD, rather than file a civil lawsuit.[1]

Mercure argues that extraordinary circumstances are present here because BHA prevented her from pursuing her remedies when it failed to provide her with HUD Form 903 (used for filing discrimination complaints with HUD) despite BHA's affirmative duty, under both its own administrative plan and 24 C.F.R. § 982.301(b)(10), to provide it to her upon enrollment in the voucher program. (Doc. 31 at 5–6.) Nor, she contends, did any BHA official provide her with HUD Form 903 in response to any of her repeated requests for reconsideration. (*Id.* at 6.) She points to *Veltri v. Building Service 32B-J Pension Fund*, 393 F.3d 318, 322–24 (2d Cir. 2004), in which the Second Circuit permitted equitable tolling of a retiree's suit against his pension fund because the fund had failed to comply with regulatory notice requirements that it inform the retiree of his right file a civil action challenging its determination of his benefits.

But BHA's failure to provide her with HUD Form 903 did not prevent Mercure from filing the civil action. The form is only for filing an administrative complaint—it says nothing about filing civil actions—and HUD accepts complaints by letter or telephone, not just on HUD Form 903, so Mercure did not need to (nor did she) file an administrative complaint on that particular form. *See* 24 C.F.R. § 103.30.

Nor does the Second Circuit's decision in *Veltri* weigh in favor of equitable tolling. In that case, the pension fund had failed to provide the plaintiff with *any* notice of his right to file a civil action or the time limits applicable to such an action. *Veltri*, 393 F.3d at 323. Here, in contrast, BHA did provide a booklet that clearly laid out Mercure's right to file a civil action and the time limits for doing so, although it failed to provide a specific form on which to file an independent administrative complaint. Moreover, the court in *Veltri* emphasized that it was "not establishing a simple mechanical rule that failure to notify a claimant of her right to bring an action in court automatically tolls the statute of limitations." *Id.* at 326. The court explained that "a plaintiff who has actual knowledge of the right to bring a judicial action … may not rely on equitable tolling notwithstanding inadequate notice." *Id.* (citing *I.V. Servs. of America, Inc. v. Inn Dev. & Mgmt., Inc.*, 182 F.3d 51 (1st Cir. 1999)). Mercure had actual knowledge well before the statute of limitations ran on October 4, 2014. On June 17, 2014, the HUD employee informed her that her administrative complaint was untimely but that the FHA "also states an aggrieved person can commence a civil action on their own in United States district court . . . no later than two years after the last act of alleged discrimination. I believe there still may be some time for Ms. Mercure to take this action if she chooses." This is sufficient notice of one's rights to file a civil action and the time period under which to do so. *See Zerilli-Edelglass*, 333 F.3d at 81 & n.8 (concluding that equitable tolling was inapplicable where, 38 days before a 300-day deadline for filing an EEOC charge, plaintiff had received letter informing her of deadline).

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[1] Mercure also argues that her attempts to seek relief from BHA should qualify as "reasonable diligence" for a "disabled single mother with limited financial means, facing homelessness, and acting without the assistance of counsel." (Doc. 31 at 5.) But Mercure offers no explanation of how her disability affected her ability to timely file a civil lawsuit. The court notes that Mercure's alleged disability was not intellectual in nature, but rather comprised a series of acute physical conditions. (Doc. 1 ¶ 6.) Moreover, the frequency and sophistication of the letters Mercure wrote to both BHA and HUD suggest that her disability had no effect on her ability to pursue her rights.

III. Conclusion

Accordingly, Defendant's motion for summary judgment (Doc. 24) is GRANTED and the case is DISMISSED WITH PREJUDICE.

Dated at Rutland, in the District of Vermont, this 16 day of November, 2016.

Geoffrey W. Crawford, Judge
United States District Court